

### **REMARKS**

Applicants have received and carefully reviewed the Final Office Action mailed November 21, 2007. Claims 71, 74, and 75 have been amended, claim 77 has been canceled, and new claims 79-83 have been added. Claims 71-76 and 78-83 are pending, with claim 78 withdrawn from consideration. Reconsideration and allowance of the pending claims are respectfully requested.

### **Rejections under 35 U.S.C. § 112, first paragraph**

Claims 71-77 are rejected as failing to comply with the written description requirement. The Examiner asserts that the disclosure does not describe a retractor having sufficient rigidity to retract tissue, as recited in claim 71. Applicants respectfully disagree with the Examiner's rejection, however in the interest of furthering prosecution, this element has been deleted from the claims. Also regarding claim 71, the Examiner asserts the disclosure does not describe an expander having first and second portions that engage the retractor to move the retractor from the unexpanded to the expanded configuration. See the specification at, for example, page 9, line 23 through page 10, line 5 and page 10, line 19 through page 11, line 5. Regarding claim 75, Figure 1 as originally filed clearly shows the distal end of the retractor completely surrounds an access path that provides access to the surgical site. Regarding claim 76, Figures 1 and 4 as originally filed and the specification at, for example, page 5, lines 9-24 discloses the retractor formed from a single piece of metal interconnected through a guide and a slot. Regarding previous claim 77, the specification discloses at, for example page 10, lines 19-22, the expander engages the distal end of the retractor. The specification and figures as originally filed do provide a written description of the claims as now amended. Reconsideration and withdrawal of the rejection are respectfully requested.

### **Drawings**

The drawings are objected to for failing to show every feature of the invention specified in the claims. In particular, the Examiner asserts that none of the drawings illustrates a reference number for a retractor. Applicants submit that the drawings as filed

show this feature at reference number 10, described in the original specification as a “cannula”. Applicants submit that the nomenclature used in the claims is not limited to that used in the specification, and one of ordinary skill in the art would clearly understand that the “retractor” recited in the claims refers to the structure indicated by reference number 10 in the drawings. Reconsideration and withdrawal of the objection are respectfully requested.

**Rejection under 35 U.S.C. § 102(e)**

Claims 71-77 are rejected as being anticipated by Bufalini (US 5,707,359).

Independent claim 71, as amended, recites:

71. (Currently Amended) A surgical spinal access system for receiving spinal instruments, comprising:  
a retractor having:  
a proximal end and a distal end, the proximal end having an access opening and the distal end sized for insertion into an incision in a patient, the proximal end and distal end having inner surfaces defining an access path, the retractor configured such that the access opening is positioned outside the patient during use,  
the retractor being configured for an unexpanded configuration completely surrounding the access path during insertion into the incision, and an expanded configuration when located a surgical site in the patient,  
the retractor when in the expanded configuration configured to expand to provide maximum exposure to a surgical site at the distal end; and  
an expander having a first portion pivotally connected to a second portion, the first and second portions structured to be inserted through the access path and engage the inner surface of the distal end of the retractor, wherein pivoting the first and second portions away from each other moves the retractor from the unexpanded to the expanded configuration.

Emphasis added. Bufalini does not appear to teach such a structure. The Examiner asserts that Bufalini teaches an expander 30 that engages with the retractor 10 to move the retractor from the unexpanded to the expanded configuration. The Examiner has not addressed the specific structure recited in independent claim 71, of an expander having a first portion pivotally connected to a second portion, where the first and second portions engage the inner surface of the distal end of the retractor, as recited in claim 71 as amended. Bufalini does not appear to teach or suggest such a structure. In fact, Bufalini appears to teach an opposite configuration in which an outer sheath 32 slides back from an inner sheath 30 that self-

expands. See FIGS. 3-5 of Bufalini. The Examiner asserts that reference number 30 of Bufalini is equivalent to the claimed expander. Bufalini teaches reference number 30 as an "inner sheath" that appears to expand when released from the outer sheath 32. See column 3, lines 57-64. As it appears that the inner sheath 30 of Bufalini is the member that expands, one of ordinary skill in the art would not consider the inner sheath to be an expander as is recited in the claims. Even if one were to consider the inner sheath 30 of Bufalini as the claimed retractor, Bufalini does not appear to teach an element having first and second portions pivotally connected, that engage the retractor as recited in claim 71. The outer sheath 32 of Bufalini appears to be a continuous sheath, described as sliding proximally along the inner sheath 30, permitting ribs 46 to expand to their funnel shape. See column 4, lines 32-36. Further, even if one were to consider the outer sheath 32 of Bufalini as an expander, the sheath does not have first and second portions that engage a retractor, as recited in the claim.

MPEP 2131 states that, in order to anticipate a claim, "[t]he identical invention must be shown in as complete detail as is contained in the ... claim." *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989)." Applicants submit that in any interpretation, Bufalini cannot be seen to teach the identical invention in as complete detail as is recited in independent claim 71.

Regarding claim 76, the Examiner asserts that Bufalini teaches a retractor formed of a single piece of metal interconnected through a guide at 50 and slot within the guide, and the expander at 30 engages the distal end of the retractor. As discussed above, element 30 of Bufalini cannot be considered the expander as recited in the claims. Further, element 50 of Bufalini is described as "a locking flange 50 for securely holding the outer sheath 32 on the inner sheath 30". See column 4, lines 6-7. The flange 50 of Bufalini is described as being integrally formed with the outer sheath 32. If the Examiner is considering the flange 50 and outer sheath 32 elements of Bufalini as being the retractor, such an interpretation is inconsistent with the claimed elements. The outer sheath 32 of Bufalini appears to be a fixed diameter sheath that constrains the inner sheath 30 in the unexpanded position. Bufalini teach "pressure by the physician allows the outer sheath 32 to slide proximally along the inner sheath 30, thereby exposing the distal end 36 of the inner sheath 30 and permitting the ribs 46 to expand to their funnel shape." See column 4, lines 32-35. As discussed above, it appears

that it is the inner sheath 30 of Bufalini that expands. In the claimed system, it is the retractor that has an expanded configuration. Thus, if one considers flange 50 (and its associated outer sheath 32) of Bufalini to be the claimed retractor, the retractor does not actually expand. Additionally, if one were to consider the inner sheath 30 as the claimed retractor, this element is not described by Bufalini as being formed from a single piece of metal interconnected through a guide and slot, as is recited in claim 76. Bufalini thus cannot be deemed to teach the identical elements recited in claim 76. For at least the reasons set forth above, Bufalini cannot be seen to teach the identical elements of independent claim 71, or the claims dependent thereon.

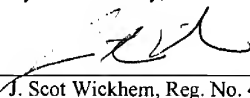
New independent claim 80 and the claims dependent thereon are believed to be distinguished from Bufalini for at least the reasons set forth above.

Reconsideration and reexamination are respectfully requested. It is submitted that, in light of the above remarks, all pending claims are now in condition for allowance. If a telephone interview would be of assistance, please contact the undersigned attorney.

Respectfully submitted,  
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By their Attorney,

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